

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 January 2004

CASE NO. 2002-LHC-00841

OWCP NO. 01-134251

In the Matter of

BERNARD J. SANTERRE
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Kathleen Coleman Tytla, New London, Connecticut,
and Robert V. Chisholm (Chisholm, Chisholm & Kilpatrick),
Providence, Rhode Island, for the Claimant¹

Kevin C. Glavin (Cutcliffe, Glavin & Archetto),
Providence, Rhode Island, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM FOR PAYMENT OF MEDICAL BILLS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Bernard J. Santerre (the "Claimant") against the Electric Boat Corporation ("EBC") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the Act). In a prior related proceeding, Administrative Law Judge David W. Di Nardi found that the Claimant injured his back and right shoulder while working at EBC on June 26, 1995,

¹ Attorney Tytla represented the Claimant at the hearing and filed a post-hearing brief. She subsequently withdrew her appearance, and Attorney Chisholm entered an appearance as replacement counsel.

and he awarded the Claimant total disability compensation and medical care. *Santerre v. Electric Boat Corporation*, Case No. 1998-LHC-01901 (Dec. 1, 1998); CX 2 at 18, 22-23. He also awarded EBC liability relief from the Special Fund pursuant to section 8(f) of the Act based on his finding that the Claimant had a pre-existing permanent partial disability which combined with the June 26, 1995 injury to produce greater degree of permanent disability. CX 2 at 24-27.² EBC did not appeal Judge Di Nardi's decision, but it subsequently rejected a claim for coverage of medical care for left leg and knee problems which it contends are unrelated to the Claimant's compensable injury of June 26, 1995. The claim for medical care was referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing was conducted before me in New London, Connecticut on July 22, 2002, at which time the Claimant appeared represented by counsel, and an appearance was made on behalf of EBC. The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-8 and EBC Exhibits ("EX") 1-6. Hearing Transcript ("TR") TR 7-9. Post-hearing briefs were filed by both parties, and the record is now closed.

Upon review of the evidence of record and the parties' arguments, I conclude that the Claimant has established that his knee condition is causally related to his employment at EBC but failed to establish that the disputed medical treatment for this condition was necessary. Accordingly, I will reject his claim for payment of the bills for this treatment. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

The Claimant is currently 58 years of age. He has an eighth grade education and has spent his adult work life performing manual labor. He went to work for EBC in 1989 as an outside machinist in EBC's Groton, Connecticut shipyard. He initially injured his back while at work on January 16, 1990, when he slipped while climbing a ladder aboard a submarine and fell on his left side and leg. He then underwent surgery to excise a damaged lumbar disc in August 1990. CX 2 at 5-6.

The Claimant returned to work at EBC following the August 1990 surgery and sustained another back injury at work in January 1991 when he was climbing a ladder and felt something "pop" in his back. TR 21-22. He reported this incident to EBC's yard hospital and was out of

² An award of Special Fund relief does not relieve an employer of its liability for an injured worker's. *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978).

work for several months, eventually returning to work as an outside machinist on light duty. TR 22.

The January 26, 1995 injury occurred when he attempted to move a boring bar weighing approximately 300 to 400 pounds. He was diagnosed with multiple disc herniations and underwent a laminectomy and fusion procedure on January 3, 1996. After this third injury, EBC eliminated his job as part of a personnel reduction, and he has not returned to work. CX 2 at 6.

Eighteen months after the surgery, the Claimant was seen by Kenneth J. Paonessa, M.D. for an orthopedic evaluation on July 31, 1997 of his complaints of persistent lower back and left leg pain. CX 6. Dr. Paonessa ordered EMG and MRI studies and, after reviewing the results of these studies, diagnosed chronic radicular pain and referred the Claimant to Richard Warner, M.D. a pain management specialist. CX 7. The Claimant began treatment with Dr. Warner in September 1997. Dr. Warner's records reflect that he has employed multiple pain interventions over the course of his treatment including lumbar injections, pain medications and insertion of a lumbar intrathecal morphine pump for what he diagnosed as failed lumbar back syndrome and chronic lumbosacral radiculopathy. CX 8. Dr. Warner's records also contain a diagnosis of bilateral osteoarthopathy of the knees. *Id.*

On February 12, 2001, the Claimant fell on his left knee while walking in his yard. He testified that he experienced an episode of pain shooting down his left leg, causing it to give out, so that he fell to the ground on both knees. TR 32-33. He testified that he had experienced left leg pain since the time of his first back injury that the leg had given out on him several times in the past and that he uses a cane to keep from falling. TR 26-28. After the February 12, 2001 incident, he went to the emergency room, and he eventually received "Synvisc" injections in the left knee from Dr. Warner. CX 3, 4. EBC refused to pay for this treatment which led to the current litigation. EX 5.

B. Medical Evidence

In an office note dated July 20, 2001, Dr. Warner addressed the relationship between the Claimant's knee problems and the back injury sustained while working for EBC:

The patient was seen on 7/16/01 to undergo Synvisc injection into his knee for his chronic knee pain. He has been under my care for quite some time now and I feel that the chronic knee pain is related to his work related back injury. With his chronic back injury and failed back syndrome, he had to apply extra stress and strain on his knees which have resulted in a chronic pain condition. He has had chronic leg pains throughout my treatment of this patient and I feel that his chronic knee pain and the injection of Synvisc is medically necessary based on his work related injury.

CX 4 at 5. Dr. Warner's qualifications are not established by the record.

EBC introduced a report and testimony from Peter R. Barrett, M.D. Dr. Barrett examined the Claimant in September 2001 and reviewed his medical records, noting a ten year history of

chronic recurring complaints of bilateral leg pain. His diagnosis for the Claimant's knees was bilateral patellofemoral chondromalacia and probable early degenerative arthritis, and he described these conditions as "developmental in nature and . . . not the result of the patient's chronic problems with his lower back." EX 1 (September 18, 2001 report) at 3. He recommended weight reduction, home therapy and use of glucosamine and chondroitin sulphate, but he added that "use of Synvisc injections in light of relatively normal appearing x-rays would be of questionable benefit." *Id.*

At his deposition, Dr. Barrett testified that he is board-certified in orthopedic surgery and specializes in the knee and shoulder. EX 1 at 4, 12. When asked by EBC's attorney whether he had made a diagnosis related to the Claimant's knees, Dr. Barrett contradicted the opinions in his report, stating, "I felt his knee condition was a result of his work activity, specifically the injury which occurred on June 26, 1995." *Id.* at 8. He explained that while the Claimant's shoulder injury would not have impacted his knees, "[t]he back, if he was limping and because if he was limping . . . that altered mechanical gait could theoretically aggravate the knee." *Id.* However, a few questions later, he reversed course again:

Q. Once again, Doctor, your opinion based upon a reasonable degree of medical certainty is the knees of Mr. Santerre upon your examination you don't feel were work-related, any problems in those knees?

A. That's correct.

Id. at 10. Dr. Barrett further testified that he noted that the Claimant was limping and using a cane at the time of his examination, though he did not know how long the Claimant had been in this state, and he said that he found evidence of crepitation in the Claimant's knees which he described as consistent with chondromalacia, an early form of arthritis. *Id.* at 9. Regarding the cause of the Claimant's chondromalacia, Dr. Barrett testified that the condition is most often the result of wear and tear, but trauma may play a contributory role:

The only trauma he provided a history for was a fall he had the year before. I don't think the chondromalacia he had was caused by the fall, but could have contributed to the fall, could have aggravated that condition if in fact he fell directly onto his kneecaps.

Id. Dr. Barrett was next asked about the Synvisc injections performed by Dr. Warner and whether, in his medical judgment, such treatment would be effective, and he responded that injections are usually provided when a patient has synovitis, inflammatory changes or effusion, in the knee. He further stated that he found no effusion in the Claimant's knees so that injections would not have been indicated. *Id.* at 10. Under cross-examination, Dr. Barrett stated that he was aware of the Claimant's history of a prior injury in 1989 when he had fallen on his left side and injured his left knee, and he stated that he had no reason to doubt the findings of other doctors that the Claimant's back pain radiating to his left leg with associated weakness is work-related. *Id.* at 15, 17-18. He also stated that it is possible that the Claimant's description of intermittent episodes of pain in back radiating to the left leg and causing weakness and buckling

was responsible for his fall. *Id.* at 20-21, 27.³ Dr. Barrett insisted that he had no way of determining whether the Claimant's fall in February 2001 actually occurred as related by the Claimant, but he stated that he would have no doubt that the fall was related to the Claimant's back problems, assuming that the history related by the Claimant is correct. *Id.* at 29. On the other hand, he testified on redirect examination that any activity can put the type of stress on the knee that causes chondromalacia and that he based his opinion that the Claimant's knee condition is not work-related on the absence of any mention in the records of falling prior to February 2001. *Id.* at 31-32. Therefore, he said that "I can't state with medical certainty that it's work related." *Id.* at 32. Finally, Dr. Barrett stated that the Claimant's bad back and difficulty ambulating was not necessarily a stressor for his knees since he was probably not as physically active due to his back limitations which, consequently, was "protective" for the knees. *Id.* at 34-35.

C. Causal Relationship Between the Claimant's Employment and Knee Injury

The Claimant bears the burden of persuasion by a preponderance of the evidence on all facts necessary to his claim; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994); but he is helped by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988).

In this case, Judge Di Nardi previously determined that the Claimant injured his back and right shoulder while working at EBC on June 26, 1995. The Claimant has now alleged that his back injury and the associated pain and weakness in his left leg caused him to experience difficulty walking, thereby causing the February 12, 2001 fall and contributing to the harm to his knees. His allegation that the injury to his knees is causally related to the workplace back injury of June 26, 1995 is fully supported by the medical opinion from Dr. Warner. Based on this evidence, I find that the Claimant has established a *prima facie* case of a compensable injury and thereby successfully invoked the section 20(a) presumption that his chondromalacia of the knees is a condition which "naturally or unavoidably" resulted from a work-related accidental injury. 33 U.S.C. § 902(2).

Since the Claimant has invoked the presumption of causation, the burden shifts to EBC to produce substantial evidence proving the absence of, or severing the presumed connection

³ EBC's objection that the question which elicited this answer called for speculation is overruled as I find the question is appropriately grounded on facts in evidence.

between, his injury and his employment. *DelVecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1981). Evidence is “substantial” if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O’Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000). See also *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that an employer “rule out” causation or submit “unequivocal” or “specific and comprehensive” evidence to rebut the presumption and reaffirming that “the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only ‘substantial evidence to contrary.’”), *cert. denied*, 124 S.Ct. 825 (2003). In my view, Dr. Barrett’s opinions on the cause of the Claimant’s knee condition and whether the back injury and altered gait contributed to his chondromalacia are simply too confusing and contradictory to rise to the level of substantial evidence. Consequently, I accord his opinions on causation minimal weight and conclude that EBC has not rebutted that presumption that the Claimant’s knee condition is causally related to his employment at EBC as the natural result of the June 26, 1995 back injury.

D. The Claimant’s Entitlement to Coverage of Treatment for his Knees

Based on Dr. Warner’s statement that Synvisc injections were medically necessary treatment for the Claimant’s knee condition, I find that the Claimant has established a *prima facie* case that the disputed medical care is compensable. See *Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984) (claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition). However, I am persuaded that his *prima facie* showing of compensability is overcome by the contrary opinion expressed by Dr. Barrett. In contrast to his vacillating and contradictory views on the cause of the Claimant’s knee condition, Dr. Barrett clearly and consistently stated that the injections administered by Dr. Warner were not appropriate in light of the objective medical findings regarding the Claimant’s knees. Unlike Dr. Warner, Dr. Barrett provided detailed explanations of the Claimant’s knee diagnosis and when Synvisc injections are medically indicated, and I find that his opinions on this issue are entitled to greater weight in view of his credentials as an orthopedic surgeon specializing in the knees in comparison to Dr. Warner, a pain specialist. While I recognize that the Claimant testified that he derived some benefit from the injections, I conclude that his subjective assessment is insufficient to outweigh the reasoned opinion of a qualified medical expert. For these reasons, I find that a preponderance of the evidence does not establish that the injections administered by Dr. Warner were necessary treatment for a work-related injury. Accordingly, the claim for payment of the bills associated with this treatment must be denied. See *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988).

E. Attorney's Fees

The Claimant's attorney has filed an itemized application for attorney's fees in the amount of \$6,049.34. EBC will be allowed 15 days, from the date this decision and order is filed in the Office of the District Director, in which to file any objection to the fee application.

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

- (1) The claim for payment of medical bills related to Synvisc injections administered by Dr. Warner is denied; and
- (2) EBC shall have 15 days, from the date this decision and order is filed in the Office of the District Director, in which to file any objection to the fee application filed by the Claimant's attorney.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts